Supreme Court, U.S.
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No. 02-1421

In The
Supreme Court of the United States

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT and HARRISON SAUNDERS,

Petitioners,

v.

PATRICK J. GRAHAM, DIRECTOR, Montana Department of Fish, Wildlife, and Parks; STAN MEYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, and TIM MULLIGAN, COMMISSIONERS, Montana Fish, Wildlife and Parks Commission, MONTANA COALITION FOR STREAM ACCESS; MONTANA WILDLIFE FEDERATION; and FISHING OUTFITTERS ASSOCIATION OF MONTANA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether a party suffering an alleged permanent physical occupation of private property without just compensation may overcome procedural bars to the takings claim by refashioning their claim as an alleged arbitrary state interference with their private property protected by the substantive provisions of the Due Process Clause of the Fourteenth Amendment.

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STATEMENT OF THE CASE

Petitioners, a group of private landowners in Montana, filed a Complaint on May 23, 2000, that challenged the constitutionality of the Montana Stream Access Law, Mont. Code Ann. § 23-2-301, *et seq*. Petitioners assert that the Stream Access Law violates the substantive due process clause of the Fourteenth Amendment of the United States Constitution in that it regulates private property for public use without being narrowly-tailored or rationally-related to any compelling or legitimate governmental purpose. In the alternative, Petitioners suggest that to enforce the Stream Access Law requires the Director of the Montana Department of Fish, Wildlife and Parks and the individuals serving on the Montana Fish Wildlife and Parks Commission, acting under the color of state law, to violate their private property rights in violation of 42 U.S.C. § 1983.

Respondents, the Director of the Montana Department of Fish, Wildlife and Parks and the individuals serving on the Montana Fish Wildlife and Parks Commission, filed a motion to dismiss the entire Complaint on August 3, 2000. Respondents-Intervenors, several local Montana sportsmen and wildlife groups, including the Montana Coalition for Stream Access, the Montana Chapter of Trout Unlimited, Fishing Outfitters Association of Montana, and the Montana Wildlife Federation, filed a separate motion on November 30, 2000, to dismiss the Petitioners' Complaint. The district court, the Honorable Charles C. Lovell presiding, issued its Opinion and Order on January 4, 2001, in which it granted in their entirety the motions to dismiss Petitioners' Complaint. 126 F. Supp. 2d 1320 (D. Mont. 2001); App. 12-27. Petitioners

filed a notice of appeal of the district court's Opinion and Order on February 5, 2001.

The Ninth Circuit affirmed the district court. 316 F.3d 867 (9th Cir. 2002) (App. 1-11). The Ninth Circuit determined that the harms alleged by Petitioners stemmed from the Petitioners' inability to exclude others from their property. (App. 5.) As a result, the Ninth Circuit addressed "whether a claim that a statute precludes private property owners from excluding others from their property must be analyzed under the Fifth Amendment's Takings Clause, or whether the analysis falls under the more generalized notions of substantive due process." (App. 6.) The Ninth Circuit reasoned that the right to exclude others represents a property right and, therefore, Petitioners have alleged harms addressed exclusively by the Fifth Amendment's Takings Clause. (App. 9.) The Takings Clause provides an explicit textual source of constitutional protection of private property, thus the Ninth Circuit concluded that "the Fifth Amendment (as incorporated by the Fourteenth), not the more generalized notion of substantive due process, must be the guide in reviewing the [Petitioners'] claim." (App. 9) quoting *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996) (en banc).

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT CORRECTLY DISMISSED PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM WHERE THE PETITIONERS ALLEGED INJURY TO PROPERTY RIGHTS SPECIFICALLY PROTECTED BY THE TAKINGS CLAUSE.

A. Montana's Stream Access Law Authorizes a Permanent Physical Occupation by the General Public of what Petitioners Allege to be Their Private Property and Their Challenge to the Law Must be Grounded in the Takings Clause.

The 1985 Montana Legislature enacted the Stream Access Law (Mont. Code Ann. §§ 23-2-301 to -322). In general terms, the Stream Access Law authorizes recreational use by the public of all navigable streams in Montana, up to the ordinary high-water mark, including the bed and banks, without regard to the ownership of the land underlying the waters. Mont. Code Ann. § 23-2-302. Unlike the federal navigation test that determines navigability based on the commercial use of the waterway, the Stream Access Law applies to all surface waters "that are capable of recreational use." *Id.* "Recreational use" includes "fishing, hunting, swimming, floating in small craft or other floatation devices, boating in motorized craft [or] craft propelled by oar or paddle." *Id.* at § 23-1-301(10).

The Stream Access Law came on the heels of two decisions by the Montana Supreme Court. First, in *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984), the court relied upon the Montana Constitution to determine that the public's right to use the waterways of Montana includes all recreational purposes within

the ordinary high-water marks. *Curran*, 682 P.2d at 167-70. The court found that those waterways in Montana imbued with the public trust included all those susceptible to public use. *Id.* at 169-70. This type of "[n]avagibility for use," according to the court, stands separate and apart from the federal question of determining "navigability for title purposes." *Id.* at 170. The court concluded, therefore, that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." *Id.* at 171. Similarly, in *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984), the court held that state law governs navigability for use and that under Montana's Constitution, "the only possible limitation of use can be the characteristics of the water themselves."

Thus, the Stream Access Law represents a codification of some portions of the decisions of the Montana Supreme Court in *Curran* and *Hildreth*. It creates a public thoroughfare, with limited exceptions, on all surface waters in Montana that are susceptible to recreational use. The public thoroughfare created by the Stream Access Law clearly authorizes a permanent physical occupation by the general public up to the ordinary high-water mark on these Montana waterways. The Stream Access Law raises the question, however, of whether it constitutes a taking of private property for public use without the payment of just compensation. No doubt exists that any taking effected by the Stream Access Law satisfies the public use requirement of the Fourteenth Amendment as it authorizes any member of the general public to use this statutorily-created thoroughfare. The only question remains as to

whether Montana should have been required to pay just compensation for this alleged taking of private property.

A group of riparian landowners, including Petitioner Harrison Saunders, sought to answer that question when they filed an action in which they alleged, among other matters, that the Stream Access Law constituted "a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution." *Galt v. State Dept. of Fish, Wildlife & Parks*, 749 P.2d 1089, 1090 (Mont. 1988) (*Galt II*). The Montana Supreme Court upheld the Stream Access Law, with a few minor exceptions, to the broad constitutional challenge in *Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (Mont. 1987) (*Galt I*). The court in *Galt I* confirmed that property owners in Montana through whose property a water course flows "have their fee impressed with a dominant estate in favor of the public." *Galt I*, 731 P.2d at 916. The court concluded that the Stream Access Law had worked no taking of private property and as a result no compensation to any riparian landowners would be required. *Id.* at 916. The plaintiffs in *Galt I* did not seek review by this Court of the decision of the Montana Supreme Court. (App. 16.)

B. Petitioners' Complaint Confirms That They Seek to Vindicate Their Right to Exclude Members of the Public From Their Property.

In 2000, nearly fifteen years after *Galt I*, Petitioners filed this action in federal district court. Rather than simply reasserting the takings claim advanced in *Galt I*, the Petitioners fashioned their claim as being grounded in alleged violations of the substantive due process provisions

of the Fourteenth Amendment. (Compl. ¶¶ 34-44; Respt. App. at 10-11.) The Petitioners' effort to seek relief under the general provisions of the substantive due process clause comes as no surprise when viewed in light of the Petitioners' failure to seek redress through any state administrative proceedings, state court proceedings, or other state tribunals, before filing this federal action. (App. 18.)

A review of Petitioners' complaint confirms that they seek to vindicate the right to exclude others from their property – a right clearly protected by the Takings Clause of the Fourteenth Amendment. For example, Petitioners allege that they "may not exclude others from their property nor prevent others from recreating on their property." (Compl. ¶ 24; Respt. App. 8.) *See Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (recognizing the right to exclude others as an essential element of *property*). This inability to exclude others from the surface waters flowing through their property has caused them to "suffer[] and continue to suffer a loss of privacy as a result of the Stream Access Law." (Compl. ¶ 22; Respt. App. 7.) Petitioners further allege that their inability to exclude others from the surface waters flowing through their property has caused them "to suffer impaired property values," particularly with respect to the recreational values of the property adjoining the waterways. (Compl. ¶ 23; Respt. App. 7-8.) *See, e.g., Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993) ("A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical invasion of the property.").

Other attendant harms arising from Petitioners' inability to exclude the public from their property include

"frequent and repeated trespasses on their property," as well as "disturbance of livestock," "garbage," "harassment" and "urination and other acts of defecation." (Compl. ¶ 26; Respt. App. 8.)[1] As these facts indicate, Petitioners have alleged injuries – the right to exclude others and attendant harms – that sound in takings. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (recognizing the right to exclude others as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"). The Takings Clause explicitly secures compensation to private parties in the event of a taking of private property by government of the kind alleged by Petitioners. *See First Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987). The Montana legislature surely has the power to take private property for public use. *First Evangelical Lutheran Church*, 482 U.S. at 315. Through the Stream Access Law, the Montana legislature properly exercised its power to take private property for public use.

By contrast, this Court has found that the substantive provisions of the Due Process Clause of the Fourteenth Amendment are designed to protect individuals "against arbitrary action of government." Petr. Br. at 8, quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Nothing arbitrary results from the Montana legislature deciding to exercise its power to condemn private property

[1] Petitioners' Complaint fails to state whether these alleged attendant harms take place within the high-water marks of the public waterways flowing through their property. Any harms taking place above the high-water marks would constitute a trespass and would subject the transgressor to potential criminal prosecution under Montana law. *See* Mont. Code Ann. §§ 45-6-201, -203, and 87-1-204.

to create a public highway. In the same manner, nothing arbitrary results from the Montana legislature deciding to exercise its power to condemn private property to create a public thoroughfare on the surface of waterways in Montana up to the high-water mark.

Petitioners incorrectly rely on *Soldal v. Cook County*, 506 U.S. 56 (1992), to argue that the Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), does not foreclose their substantive due process claim. *Soldal* simply confirmed that the Fourth Amendment protects against all types of seizures of property by government officials, not just those that stem from searches conducted by government officials. Law enforcement officers, called at the request of a trailer park owner, assisted the owner in towing away a private party's mobile home for alleged nonpayment of rent. *Soldal*, 506 U.S. at 61.

The Seventh Circuit rejected the mobile home owner's claim grounded in the Fourth Amendment on the basis that *Graham* required it to look to the "dominant character of the conduct challenged" and, therefore, determined that *Soldal's* claim more closely resembled a challenge against an alleged "deprivation of property without due process of law than against an unreasonable seizure." *Id.* at 70. Accordingly, the Seventh Circuit concluded that the mobile home owner could not bring an action grounded in the Fourth Amendment. *Id.* This Court reversed, noting that the conduct at issue constituted a "classic seizure" of the type protected by the Fourth Amendment: "Surely, *Graham* does not bar resort in this case to the Fourth Amendment's specific protection for 'houses, papers, and effects' rather than the general protection of property in the Due Process Clause." *Id.* at 70-71.

In this case, the Takings Clause provides the specific constitutional protection for Petitioners' claim of the loss of the ability to exclude others from their property and attendant harms stemming from this inability to exclude others, rather than the more general provisions of the substantive component of the Due Process Clause. The Ninth Circuit properly dismissed Petitioners' substantive due process claim.

II. THE NINTH CIRCUIT'S DECISION TO DISMISS PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM COMPORTS WITH THE DECISIONS OF OTHER CIRCUITS TO REQUIRE ACCURACY IN PLEADING.

Petitioners correctly note confusion among the circuit courts regarding the correct relationship between the protections afforded by the Takings Clause and those provided by the substantive component of the Due Process Clause. Petitioners fail to discuss, however, that the recent trend points to more uniformity in circuit courts in rejecting substantive due process claims that properly should have been pleaded as takings claims. And regardless of any split among the circuit courts, the Petitioners here have alleged a violation of the property right to exclude members of the public – a clear violation of the Takings Clause. The Court's resolution of the alleged split among the circuit courts would have no effect on the Petitioners' attempt to dress up its garden-variety takings claim as a substantive due process claim. The Court should await a better vehicle to address any split among the circuit courts regarding the proper relationship between takings claims and substantive due process claims.

A. The Circuit Courts Have Permitted Substantive Due Process Claims Alleging Deprivations of Property Rights to Proceed Under Limited Circumstances Not Present Here.

Petitioners contend that "[s]even Circuits have recognized that a person's property is protected by both the Due Process Clause and the Takings Clause." (Petr. Br. at 13.) An analysis of decisions from the Fifth, Sixth, and First Circuits demonstrate, however, a prevailing trend away from analyzing such claims under the more generalized protections of the substantive component of the Due Process Clause and toward the more specific protections of the Takings Clause.

Petitioners point to decisions from the Fifth Circuit in *Simi Inv. Co., Inc. v. Harris County*, 236 F.3d 240, 247 (5th Cir. 2000), and *John Corp. v. City of Houston*, 214 F.3d 573, 581 (5th Cir. 2000). (Petr. Br. at 13.) In *John Corp.*, the Fifth Circuit rejected the blanket rule that, under *Graham*, the Takings Clause subsumes any substantive due process claim relating to deprivation of property, and ruled, instead that "a careful analysis must be undertaken to assess the extent to which a plaintiff's substantive due process claim rests on protections afforded by the Takings Clause." *John Corp.*, 214 F.3d at 583. The court in *Simi Inv. Co.*, relying largely on *John Corp.*, also refused to dismiss a substantive due process claim where the plaintiff alleged that Harris County arbitrarily interfered with its property rights, not that Harris County authorized any physical occupation of their property. *Simi Inv. Co.*, 236 F.3d at 247.

These decisions tell only part of the story in the Fifth Circuit. Petitioners fail to inform the Court that in its order denying en banc review, the court in *Simi Inv. Co.*,

addressed the concern raised by Harris County as to the scope of the substantive due process holding. The court recognized that "[i]n the majority of cases involving landowner complaints, substantive due process is not the appropriate avenue of relief." *Simi Inv. Co., Inc. v. Harris County*, 256 F.3d 323, 323 (5th Cir. 2001). In particular, the court stated that "artful pleading" of substantive due process claims cannot circumvent the court's Takings Clause jurisprudence. *Id.* And more recently, the court in *Sandy Creek Investors, Ltd. v. City of Jonestown*, 2003 U.S. App. LEXIS 5651 (5th Cir. Mar. 23, 2003), rejected an attempt to avoid Takings Clause analysis through such "artful pleading."

In *Sandy Creek*, the plaintiffs alleged that the City of Jonestown's actions in refusing to approve their land development permit despite the fact that the permit met all requirements of state and local law "were arbitrary, unreasonable, capricious, and lacking a substantial relation to any valid legislative/governmental objective." *Sandy Creek* at *4. The plaintiffs sought damages equal to the value of the property that they could not develop. *Id.* The court rejected this attempt to evade takings analysis and its exhaustion requirement. Although the Takings Clause does not necessarily subsume all substantive due process claims alleging deprivations of property, the court concluded that the plaintiffs' complaint that the City of Jonestown had violated the Fourteenth Amendment "was framed only as a takings claim" and, therefore, the plaintiffs' failure to exhaust state remedies deprived the federal court of jurisdiction over the claim. *Id.* at *7. *See also Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (relying on *Albright v. Oliver*, 510 U.S. 266 (1994), in dismissing substantive due process claim).

A similar narrowing took place in the Sixth Circuit. In *Pearson v. City of Grand Blanc,* 961 F.2d 1211, 1214 (6th Cir. 1992), the court rejected the notion that all federal constitutional challenges to unlawful zoning must be analyzed as potential takings claims. The court recognized that although such an approach "has the undoubted salutary advantage of minimizing the involvement of federal courts in local zoning, [it] cannot be reconciled with current controlling precedent." *Pearson*, 961 F.2d at 1214. A more recent decision in *Montgomery v. Carter County, Tenn.,* 226 F.3d 758, 768-70 (6th Cir. 2000), challenges this conclusion. The court in *Montgomery* acknowledged, based on *Pearson,* that the Sixth Circuit's "precedents" permit a party to assert a substantive due process claim along with the takings claim. The court questioned, however, "why the concept of substantive due process should have any place in takings cases." *Id.* at 770.

The trend continues in the First Circuit. In *South County Sand & Gravel, Inc. v. Town of South Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998), the court alleged that a local ordinance limiting expansion of gravel pits violated their procedural and substantive due process rights. After reviewing the complaint, the court noted that "[b]ecause [plaintiffs'] lament, at bottom, is a garden-variety regulatory takings claim, the Takings Clause, not substantive due process, would seem to supply the proper decisional framework." *South County Sand & Gravel*, 160 F.3d at 835, citing *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 612-14 (11th Cir. 1997); *Armendariz v. Penman*, 75 F.3d 1311, 1325-26 (9th Cir. 1996) (en banc). Although the court recognized that the substantive limits of the Takings Clause may not always coincide with the substantive limits of the Due Process Clause in every conceivable

context, it explained that the "legal trend" had shifted away from allowing plaintiffs to assert generalized substantive due process violations. *Id.* at 835 n.2, citing *Albright*, 510 U.S. at 273; *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017-19 (1992) (concluding that a regulation that deprives land owner of economic value is a compensable taking). More recently in *Parella v. Retirement Board of the Rhode Island Employees' Retirement System*, 173 F.3d 58 (1st Cir. 1999), the First Circuit noted that "other recent decisions suggest that when faced with multiple, potentially relevant constitutional provisions, courts should invoke the provision that treats most directly the right asserted." *Id.* at 58, citing *Graham v. Connor*, 490 U.S. at 395; *Armendariz v. Penman*, 75 F.3d at 1324. The circuit courts' efforts to resolve any differences regarding their approaches to substantive due process/takings claims obviates the need for the Court to intervene at this point.

B. The Court Should Await a Better Vehicle to Resolve Any Split Among the Circuit Courts Regarding the Relationship Between Substantive Due Process Claims and Takings Claims.

Even if the Court determines that a split exists among the circuit courts regarding the proper relationship between a takings claim and a substantive due process claim, the Court should wait for a better vehicle to resolve any split. No doubt exists that Petitioners' object to the Stream Access Law due to the constraints that it imposes on their ability to exclude the public from portions of their property. (Compl. ¶¶ 24, 39, 53; App. 8, 11, 13.) The ability to exclude others represents "the hallmark of a private

property interest." *Id.* at 13. *See also Kaiser Aetna v. United States*, 444 U.S. at 176 (recognizing the right to exclude others as an essential element of *property*). Although the Stream Access Law permits the public to use portions of their property, Petitioners allege that it was enacted for an improper purpose and thereby violates their substantive due process rights. (Apps. 11, 13.)

In *Forseth v. Village of Sussex*, 199 F.3d 363 (7th Cir. 2000), the court noted that physical occupations undertaken for an improper purpose, such as wholly private uses, should be reviewed pursuant to a takings analysis rather than under a substantive due process analysis. *Id.* at 369 n.8 (citations omitted). Takings analysis, of course, requires a party to exhaust its available state remedies. *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 193-94 (1985). Many courts have imposed the same exhaustion of available state remedies requirement in order to sustain a substantive due process claim. *See, e.g., Signature Properties Intern., Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1267-68 (10th Cir. 2002) (refusing to excuse exhaustion requirement for alleged substantive due process violation). Petitioners have not availed themselves of any potential state remedies. This failure to exhaust potential state remedies imposes insuperable barriers to Petitioners' claim regardless whether it be viewed as a takings claim or a substantive due process claim. The Court should wait for a case in which resolution of the substantive due process/takings analysis would alter the outcome of the underlying claim.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

HARVEY AND DORIS MADISON, CHARLES AND ELENA D'AUTREMONT, AND HARRISON SAUNDERS, Plaintiffs, v. MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; PATRICK J. GRAHAM, DIRECTOR, MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS; MONTANA FISH, WILDLIFE & PARKS COMMISSION; AND STAN MYER, DAVID SIMPSON, CHARLES DECKER, DARLYNE DASCHER, AND TIM MULLIGAN, COMMISSIONERS, Defendants.	Civil Action No. CV-00-18-H-CCL **COMPLAINT** (Filed May 31, 2000)

INTRODUCTION

Plaintiffs, by and through their attorney, Mountain States Legal Foundation, file this Complaint against Defendants, Montana Department of Fish, Wildlife & Parks; Patrick J. Graham, Director, Montana Department of Fish, Wildlife & Parks, in his individual and official capacity; Montana Fish, Wildlife & Parks Commission; and Stan Meyer, David Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan, Commissioners, in their individual and official capacities, and allege the following:

JURISDICTION AND VENUE

1. The jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1331, because the matter in controversy arises under the Constitution and/or laws of the United States.

2. Venue rests properly in this Court, pursuant to 28 U.S.C. §§ 1391(b), because Defendants reside in this judicial district.

PARTIES

3. Plaintiffs Harvey and Doris Madison are residents of Absarokee, Montana. In 1905, a one thousand-acre ranch on the Stillwater River in Stillwater County, Montana, was homesteaded by Mr. Madison's grandfather, Mathew Madison. Since 1978, the Madisons have owned the ranch pursuant to inheritance of the Desert Lands homestead patent issued by the United States to Mathew Madison in 1905. Their property encloses approximately one mile of the Stillwater River, which is not, and historically has never been, commercially navigable.

4. Plaintiffs Charles and Elena d'Autremont maintain a residence in Alder, Montana. Since 1978, the d'Autremonts have owned a 275-acre ranch on the Upper Ruby River in Madison County, Montana. Their property encloses approximately one and one half miles of the Ruby River, which is not, and historically has never been, commercially navigable.

5. Plaintiff Harrison Saunders is a resident of Ennis, Montana. Since 1876, a ranch of approximately 100 acres on O'Dell Creek in Madison County, Montana, has been owned and controlled by the Saunders family. Since the 1950s, Mr. Saunders has owned an interest in the ranch, and today he retains a life estate in the property, with the remainder deeded to his son and daughters. His property encloses approximately three-quarters of a mile of O'Dell Creek, which is not, and historically has never been, commercially navigable.

6. Defendants Montana Department of Fish, Wildlife & Parks is the state agency responsible for management of fish, wildlife, parks, and recreational resources. Defendant Patrick J. Graham is the Director of the Montana Department of Fish, Wildlife & Parks and is the official primarily responsible for the Department's fulfillment of its obligations. Defendants Stan Meyer, David Simpson, Charlie Decker, Darlyne Dascher, and Tim Mulligan form the Defendant Montana Fish, Wildlife & Parks Commission. The Commission sets fish and wildlife regulations, approves property acquisitions, and approves rules and activities of the Department as provided by Montana statute.

FACTUAL BACKGROUND

7. Montana Code Annotated, Section 70-1-202, provides:

> The state is the owner of:
>
> (1) all land below the water of a navigable lake or stream;
>
> (2) all property lawfully appropriated by it to its own use . . .

8. Montana Code Annotated, Section 70-16-201, provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

9. The streambed and banks underlying the portion of the Stillwater River flowing through Plaintiff Madisons' property are privately owned by the Madisons, because that portion of the Stillwater is not, and has never been, commercially navigable. The Madisons own title to and pay taxes on the streambed and banks underlying the Stillwater River on their property.

10. The Stillwater River flows within approximately 300 yards of the Madison's home and within approximately 50 feet of a barn on their property. The Madisons keep cattle and horses on their property near the river banks.

11. The streambed and banks underlying the portion of the Ruby River flowing through Plaintiff d'Autremonts' property are privately owned by the d'Autremonts, because that portion of the Ruby River is not, and has never been, commercially navigable. The d'Autremonts own title to and pay taxes on the streambed and banks underlying the Ruby River on their property.

12. The Ruby River flows within 150 feet of the front door of the d'Autremont's dwelling on their property.

13. The d'Autremonts purchased their Montana property after a two-year search that took as far as British Columbia and Alberta, Canada. After a number of years in the whitewater outfitting business in Wyoming and Utah, they were specifically looking for a remote and private place to raise a family.

14. After purchasing their Montana property, the d'Autremonts ejected a steady stream of trespassers for several years and saw a corresponding improvement in the fishing on their property. All of their neighbors followed the same practice, under the belief that since they held title to and paid taxes on the land under the stream, they were entitled to choose who stood on it.

15. The streambed and banks underlying the portion of O'Dell Creek flowing through Plaintiff Saunders property are privately owned by Mr. Saunders, because that portion of O'Dell Creek is not, and has never been, commercially navigable. Mr. Saunders owns title to and pays taxes on the streambed and banks underlying O'Dell Creek on his property.

16. O'Dell Creek flows within approximately one-quarter mile of Mr. Saunders' home on his property. Mr.

Saunders has used rip-rap on the stream banks to protect the stream against erosion and has restricted grazing to horses only for over 30 years in order to protect the stream bank and encourage a more productive fish habitat.

17. The Montana Stream Access Law, judicially created in 1984 and subsequently codified in 1985, provides that all surface waters in the state capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters. The Law allows recreational use up to the ordinary high-water mark of rivers and streams. The public is also given the right to "portage" around barriers or obstructions in the water when necessary by going above the high-water mark onto the landowner's property. Recreational uses that are permitted include fishing, hunting, swimming, camping, floating, use of motorized watercraft, building fires below the high-water mark, and "related unavoidable or incidental uses." Mont. Code Ann. §§ 23-2-301, *et seq.*

18. Montana Code Annotated, Section 23-2-301(12), provides:

> "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark.

19. Montana Code Annotated, Section 23-2-302(1), provides:

> [A]ll surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

20. Montana Code Annotated, Section 23-2-308, provides:

> The provisions of this part and the recreational uses permitted by 23-2-302 do not affect the title or ownership of the surface waters, the beds, and the banks of any navigable or nonnavigable waters or the portage routes within this state.

21. Montana Code Annotated, Section 23-2-311(1), provides:

> A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of his rights.

Section 23-2-311(4) provides that such portage around natural barriers, such as waterfalls, rocks, and fallen trees, is neither "lawful [n]or unlawful."

22. Plaintiffs have suffered and continue to suffer loss of privacy as a result of the Stream Access Law. They have lost the right to privacy as guaranteed by Article II, Section 10 of the Montana Constitution. Since the passage of the Montana Stream Access Law, the d'Autremonts have lost the very privacy for which they purchased their property, and all plaintiffs have lost the privacy that they have treasured on their land for decades.

23. Plaintiffs have suffered and continue to suffer from impaired property values as a result of the Stream Access Law. Seven years before passage of the Stream Access Law, the d'Autremonts paid a substantial recreational, not agricultural, price for their property. As a result of the Stream Access Law, the recreational value of

the property is impaired. For more than 25 years, prior to the passage of the Stream Access Law, Mr. Saunders and his family leased the right to use the stream and the streambed on his property for $4000 up to $11,500 per year. As a result of the Stream Access Law, Mr. Saunders is no longer able to earn this substantial amount toward his retirement from use of his property by others.

24. Plaintiffs may not exclude others from their property nor prevent others from recreating on their property near their home, buildings, and livestock as a result of the Stream Access Law.

25. Plaintiffs have lost the inalienable right to acquire, possess, and protect property as guaranteed by Article II, Section 3 of the Montana Constitution as a result of the Stream Access Law.

26. Plaintiffs have been and continue to be subject to frequent and repeated trespasses on their properties, which the State is unable to stop or to prevent due to the remote nature of the properties. Plaintiffs have also suffered and continue to suffer, among other harms, disturbance of livestock, garbage left on the property, harassment or interference with Plaintiffs' attempts to use their own property, and urination and other acts of defecation on the property as a result of the public access permitted by the Stream Access Law. In addition, stream users build campfires and prepare meals, subjecting Plaintiff's private property to the risk of forest and grass fires.

27. The boundaries of public access are not clearly defined. The "high-water mark" can be difficult to ascertain, leaving Plaintiffs, the recreating public, and even the Department of Fish, Wildlife & Parks, uncertain of this mark and the precise limits of public access.

28. The Stream Access Law also explicitly fails to define the legality of portage around natural barriers in a stream, creating much uncertainty not only for Plaintiffs and other property owners subject to the Stream Access Law, but for all involved in use and enforcement of the Law.

29. Outfitting businesses target high-quality properties and build their businesses on use of Plaintiffs' properties as a result of the Stream Access Law. The d'Autremonts' property has been and continues to be the subject of advertisement and profit for a neighboring outfitter. Outfitting businesses and others regularly benefit financially from use of the Madisons' and Mr. Saunders' properties.

30. In 1987, the Montana Supreme Court upheld the Stream Access Law, asserting the public trust doctrine, against a property owner's challenge. *See Galt v. State Dept. of Fish, Wildlife & Parks*, 731 P.2d 912 (1987). With the exception of a few auxiliary provisions, the Law was upheld as conforming to the requirements of the Montana Constitution. The public trust doctrine was asserted by the Montana Supreme Court as the original basis for public stream access in *Montana Coalition For Stream Access v. Curran*, 682 P.2d 163 (Mont. 1984), and *Montana Coalition For Stream Access v. Hildreth*, 684 P.2d 1088 (Mont. 1984).

31. The "public trust" provision of the Montana Constitution, Article IX, Section 3(3), provides:

> All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and

> subject to appropriation for beneficial uses as provided by law.

FIRST CLAIM FOR RELIEF

32. Plaintiffs reallage Paragraphs 1 through 31.

33. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

34. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects individual liberty against certain government actions, regardless of the fairness of the procedures used to implement them.

35. The Due Process Clause provides heightened protection against governmental interference with fundamental rights and liberty interests.

36. Where a state law infringes upon a fundamental right, that state law must be narrowly tailored to serve a compelling state interest in order to comport with substantive due process.

37. Where a state law infringes upon a non-fundamental right, that state law must substantially advance a legitimate state interest in order to comport with substantive due process.

38. The right to own and use private property is a fundamental right and liberty, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty.

39. The power to exclude others is the hallmark of a private property interest, an essential component of private property rights.

40. There is no public trust in private property. The public trust doctrine does not extend, and has not historically extended, to recreational use of historically non-navigable waters. Thus, the Montana Stream Access Law was enacted for purposes completely unrelated to the public trust doctrine and its purposes.

41. There is neither a compelling nor a legitimate state interest in regulating private property for public use under the public trust doctrine.

42. The Montana Stream Access Law is not narrowly tailored to any compelling or legitimate state interest in regulating private property for public use under the public trust doctrine.

43. The Montana Stream Access Law does not substantially advance a legitimate state interest in regulating private property for public use under the public trust doctrine.

44. The Montana Stream Access Law constitutes a violation of the substantive due process guaranteed by the Fourteen Amendment to the United States Constitution.

ALTERNATIVE FIRST CLAIM FOR RELIEF

45. Plaintiffs reallege paragraphs 1 through 31.

46. Title 42, Section 1983 of the United States Code provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

47. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

48. The Due Process Clause of the Fourteenth Amendment contains a substantive component that protects individual liberty against certain government actions, regardless of the fairness of the procedures used to implement them.

49. The Due Process Clause provides heightened protection against governmental interference with fundamental rights and liberty interests.

50. Where a state law infringes upon a fundamental right, that state law must be narrowly tailored to serve a compelling state interest in order to comport with substantive due process.

51. Where a state law infringes upon a non-fundamental right, that state law must substantially advance a legitimate state interest in order to comport with substantive due process.

52. The right to own and use private property is a fundamental right and liberty, deeply rooted in this

Nation's history and tradition and implicit in the concept of ordered liberty.

53. The power to exclude others is the hallmark of a private property interest, an essential component of private property rights.

54. There is no public trust in private property. The public trust doctrine does not extend, and has not historically extended, to recreational use of historically non-navigable waters. Thus, the Montana Stream Access Law was enacted for purposes completely unrelated to the public trust doctrine and its purposes.

55. There is neither a compelling nor a legitimate state interest in regulating private property for public use under the public trust doctrine.

56. The Montana Stream Access Law is not narrowly tailored to any compelling or legitimate state interest in regulating private property for public use under the public trust doctrine.

57. The Montana Stream Access Law does not substantially advance a legitimate state interest in regulating private property for public use under the public trust doctrine.

58. The Montana Stream Access Law constitutes a violation of the substantive due process guaranteed by the Fourteen Amendment to the United States Constitution.

59. Under color of the Montana Stream Access Law, Defendants Patrick J. Graham, Stan Meyer, Davis Simpson, Charles Decker, Darlyne Dascher, and Tim Mulligan have subjected Plaintiffs or caused Plaintiffs to be subjected to the deprivation of rights, privileges, or immunities

secured by the Constitution and laws of the United States, and these Defendants continue to subject Plaintiffs to such deprivation, and these Defendants are liable therefore.

SECOND CLAIM FOR RELIEF

60. Plaintiffs reallage paragraphs 1 through 59.

61. Adequate notice of what conduct is permitted and what conduct is proscribed is a component of a statute's conformity with due process.

62. The Montana Stream Access Law fails to provide adequate notice as to what conduct is permitted and what conduct is proscribed with regard to portage around natural barriers in a stream and with regard to streams in which the high water mark is not readily ascertainable.

63. The Stream Access Law is unconstitutionally vague and void for vagueness.

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Declare and adjudge the Montana Stream Access Law to be in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

(2) Enjoin Defendants permanently from enforcing the Montana Stream Access Law with regard to privately owned streambeds and banks underlying historically non-navigable waters in the State of Montana.

(3) Award Plaintiffs costs and attorneys' fees.

(4) Award Plaintiffs such further relief as is just and equitable.

DATED this 26th day of May, 2000.

Respectfully submitted,

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